STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JUDITH MAE GORCEY, Charging Party, v. OXNARD EDUCATORS ASSOCIATION, Respondent.	Case No. LA-CO-369 Request for Reconsideration PERB Decision No. 664 PERB Decision No, 664a August 26, 1988
JAN MARIE TRIPP, Charging Party, v. OXNARD EDUCATORS ASSOCIATION, Respondent.	Case No. LA-CO-370

Appearances; Rosenmund & Rosenmund by Michael A. Morrow for Jan Marie Tripp and Judith Mae Gorcey; Schwartz, Steinsapir, Dohrmann & Sommers by Michael R. Feinberg for Oxnard Educators Association.

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION

SHANK, Member: The Public Employment Relations Board (PERB or Board) initially ruled on an appeal of the partial dismissal of Oxnard Educators Association (1988) PERB Decision No. 664, holding, inter alia, that the Regional Attorney erred in dismissing an alleged violation of section 3544.9 of the Educational Employment Relations Act filed by Judith Mae Gorcey and Jan Marie Tripp (Charging Parties) against Oxnard Educators Association (OEA) and remanded the case to the General Counsel for issuance of a complaint.

OEA has asked the Board to reconsider the partial dismissal pursuant to Regulation 32410,[1] based on "newly discovered" evidence. OEA alleges that at a hearing on the merits in a related charge, evidence was presented and a proposed decision issued that should have been considered by the Board.[2]

The Board in San Joaquin Delta Community College District (1983) PERB Decision No. 261b set forth a three-part test to determine whether to grant a new hearing on the basis of newly discovered evidence. The party requesting reconsideration on the basis of newly discovered evidence must establish that the evidence (1) is newly discovered, (2) that reasonable diligence has been exercised in its discovery and production, and (3) that it is material in the sense that it is likely to produce a different result.

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[1]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq. Regulation 32410 states in pertinent part:

> (a) . . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

[2]The Board has since issued its decision affirming the proposed decision and dismissed the allegation that OEA failed to adequately communicate with or receive input from unit members before agreeing to a new salary schedule that adversely affected the Charging Parties. Oxnard Educators Association (1988) PERB Decision No. 681.

OEA's request must fail in the instant case because it has not shown "reasonable diligence" in the production of newly discovered evidence.

The requirement of diligence in the presentation of newly discovered evidence has been strongly emphasized. The parties seeking reconsideration must provide not only new evidence, but also a satisfactory explanation for the failure to produce the evidence at an earlier time. San Joaquin Delta Community College District (1983) PERB Decision No. 261b, citing Blue Mountain Development Company v. Chester Carvill (1982) 132 Cal.App.3d 1005, at 1013.

Here, OEA had the allegedly newly discovered evidence in its possession for 10 months before presenting it to the Board. The Administrative Law Judge's (ALJ) proposed decision could have been brought to the Board's attention at or near the time OEA received it, in July, 1987, well in advance of the issuance of PERB's decision. Indeed, Charging Parties served OEA with a copy of a request to augment the record on appeal in January, 1988. OEA provides absolutely no explanation for waiting 10 months before disclosing such evidence.

OEA endeavors to introduce evidence from the prior hearing that it did not breach its duty of fair prepresentation by failing to adequately communicate with and receive input from unit members during the negotiations process leading up to

ratification. Here, the issue is whether or not OEA acted arbitrarily, discriminatorily or in bad faith with regard to the targeting of certain steps on the salary schedule. Therefore, the focus in the instant case is somewhat different, i.e., OEA's motivation in negotiating the new salary schedule rather than its interactions with unit members.

Therefore, having rejected OEA's argument in support of its request for reconsideration, for the reasons set forth above, we find that the OEA has failed to demonstrate extraordinary circumstances warranting reconsideration.[3]

ORDER

The request by Oxnard Educators Association that the Public Employment Relations Board grant reconsideration of Oxnard Educators Association (1988) PERB Decision No. 664 is DENIED.

Member Craib joined in this Decision.

Chairperson Hesse's concurrence begins on page 5.

[3]Our denial of OEA's request for reconsideration does not mean that we view the dismissal in the related case to be irrelevant. To the contrary, the ALJ may properly apply the doctrine of collateral estoppel to prevent the parties from relitigating matters decided in Oxnard Educators Association (1988) PERB Decision No. 681. (See Kern County Office of Education (1987) PERB Decision No. 630, at footnote 2).

Hesse, Chairperson, concurring: I concur with the decision insofar as the request for reconsideration is denied. However, I respectfully disagree with the decision by the Board itself to defer the case to an ALJ after a complaint is issued. While ALJs typically conduct a hearing prior to review by the Board itself, this case lends itself to an alternative procedure. Pursuant to Government Code sections 3541.3(h) and (i), I would issue an order to show cause as to why the case should not be decided based on the record presented in Oxnard Educators Association (1988) PERB Decision No. 681. Although the central issue in the Oxnard decision concerns the duty of fair representation in the contract ratification process, the Oxnard record is replete with testimony and references to the bargaining history and the Association's motives and conduct therein. Contrary to my colleagues assertion, counsel for Charging Party saw little distinction between the bargaining and ratification conduct. In relevant part, counsel argued:

> Morrow: . . . They took away a guaranteed right in that contract, and without any notice.
>
> So I think that is evidence of arbitrary conduct engaged in by this union between November 8th and November 20th. And for those reasons, and those reasons only, what I wish to introduce any evidence regarding 45028, in particular whether or not the people who were negotiating or presenting the contract to their own membership knew anything about it. [Sic] (Trans. Vol. I, p. 27.)

Counsel for respondent later countered:

> Feinberg: The evidence that we've been

> presenting concerning bargaining history throughout 1985 all goes to the union's obligations to be a proper collective bargaining representative and to fairly represent. The alternative, which is apparently discussed at the October 3rd, 1985 rep counsel meeting for filing a lawsuit, while certainly a possibility for -- I mean the OEA has the standing to bring a lawsuit in fact, but it is not part of its collective bargaining authority to bring a lawsuit. That is not an obligation at any time of the union, to bring a lawsuit. (Trans. Vol. II, p. 60.)

In the interest of judicial economy, I would not defer action, I would consider the case now.